Committee on Discovery and Expedited Litigation

The Committee on Discovery and Expedited Litigation met on Tuesday, November 25, 2014, at 2:00 p.m. at 225 Spring Street, Wethersfield in Room 204.

Those attending: Hon. Marshall K. Berger, Jr.; Hon. William H. Bright, Jr. (chair); Hon. Sheila A. Ozalis; Hon. Antonio C. Robaina; Hon. Angela C. Robinson; Atty. Jared Alfin; Atty. Michael O. Connelly; Atty. David J. Crotta, Jr.; Atty. Elizabeth Greenspan; Atty. John J. Kennedy, Jr.; Atty. Margaret A. Pothin; Atty. James K. Smith; Atty. Elizabeth J. Stewart; and Atty. Kirkor D. Tavtigian, Jr.

I. Welcome and Introduction of Members – Judge Bright welcomed the members and the members introduced themselves.

II. Discussion of Civil Re-engineering Process – Judge Bright provided brief background on why this committee was formed. The Chief Justice is interested in looking at the civil litigation process and coming up with a system to better manage and dispose of cases in a more efficient way than we do now with a particular focus on discovery and looking at streamlined tracks for different classes of cases. Nationally, many states are developing streamlined litigation options and looking at ways to reduce the cost of discovery.

A review of the chart of pending cases shows that four categories of cases represent over three-quarters of our current case load: collections, foreclosures, motor vehicle cases, and premises liability cases. These cases typically do not require a great deal of judicial intervention or discovery. For example, motor vehicle and premises liability cases have standard interrogatories already. The problem lies more in the small commercial, medical malpractice cases, and land use disputes. Discovery can quickly become disproportionate in these cases.

III. Background and Discussion of Discovery Issues – The members discussed generally whether there were issues with discovery and what those issues were. The consensus was that standard discovery works pretty well, but without a cut-off, it can go on too long. Some of the problems observed were the excessive nature of some discovery; the prevalence of boilerplate objections to discovery which result in unnecessary arguments and waste time; the absence of any discovery cut-off; and the difficulty in obtaining reports and films from medical providers.

Possible solutions included expanding standard discovery to additional case types; implementing automatic disclosures requiring a plaintiff to turn over a certain class of documents (e.g., authorizations, films and medical reports), although the timing of these disclosures should take into consideration the large volume of cases that get filed and resolved almost immediately; setting a short deadline for the exchange of standard discovery and production by both sides simultaneously; establishing deadlines that take into account motions to dismiss and other dispositive motions; requiring the attorneys to talk to one another first and then have a telephone conference with the judge to attempt to

resolve a discovery dispute; or requiring the attorneys to submit a short statement of their position by email or mail rather than a motion.

The members also discussed generally the value of early judicial intervention, including a meaningful pretrial and mediation; including clients in the early conferences; the use of experienced attorneys as special masters either for these early conferences or for discovery disputes; whether decisions from special masters would be binding or otherwise have some "teeth"; and the potential for a party to use the special master process to drag out the process.

Discussion of the arbitration program then ensued. The arbitration program can only be effective when both litigants come prepared and put on their case. If one side is only coming to see the other side's case or if no one shows up and just wants the arbitrator to read through papers, it is a waste of time. Arbitrators must not bring their own bias to the process and also need credibility – perhaps arbitrators need the ability to refuse to hear a case in circumstances where the parties are not prepared to put on their case. Some member felt that even if the arbitrator's decision is not accepted, the arbitration itself frames the discussion and helps move the process along. Discussion included making the program mandatory with an "opt-out" provision; making it a voluntary program based upon the request of a party or upon the agreement of both parties; or imposing some type of incentive or disincentive as a result of refusing to accept the arbitrator's decision: lost pretrial interest, get attorney's fees, etc.; or allowing parties to choose an arbitrator from three options. It might be worth looking at statistics on the program from a location, such as New Haven, Hartford and Stamford, to see whether it is more successful in one location than another and then identify the reasons for the difference.

The group also discussed the possibility of eliminating interrogatories entirely; limiting the number of interrogatories in cases where no standard discovery currently exists; and limiting the subject matter of interrogatories to names and addresses of witnesses, for example. Some members felt that interrogatories are not particularly useful; others disagreed. The possibility of utilizing a Request for Admission was also mentioned. After several discussions over the course of the meeting, the group seemed to agree to expand the standard interrogatories to medical malpractice cases, and Atty. Kennedy agreed to contact both plaintiff and defense counsel to see if there is an overall interest in creating standard disclosure for these cases, and to identify the kinds of questions that should be included. It was noted that standard discovery would not preclude other questions. Standard discovery could also be developed for employment cases and some commercial cases as well, and then further discussion could occur about the number of additional interrogatories that are needed. Concern over the potential cost of depositions was raised.

Discussion then turned to limits on depositions: limiting the number of depositions or limiting the total number of hours for depositions, with an option of asking for additional hours or numbers for good cause shown. After a lengthy discussion, the consensus was that a limit of six hours on depositions might be reasonable, provided there is the option of

asking for additional time. These types of limits could be helpful in small commercial cases, but would also be reasonable in personal injury and medical malpractice cases. Further discussion about having a presumptive rule as opposed to setting those limits at the initial status conference ensued. Concern over the possibility that a bright line rule might result in increased motion practice was expressed. Also, the importance of addressing the situations where the deponent deliberately slows the pace of the deposition was emphasized. This situation is one that could be addressed by the judge as appropriate.

In terms of trial dates, the group believed that the average collection case would be ready for trial in six months. It was observed that in case where a PJR is filed to secure the assets, parties will sometimes agree to forego the PJR hearing and take an expedited trial in an even shorter time frame.

For a standard personal injury cases (slip and fall/motor vehicle), having a trial within a year to eighteen months seemed reasonable to the committee members. Sometimes there are issues with unexpected surgeries, failed surgeries or a plaintiff's continuing treatment, but these situations could be handled. An issue was raised with respect to standard discovery. The existing discovery does not require the production of medical records regarding an issue that is not alleged to have been caused by the accident, and it is something that could hold up a case. The standard discovery could possibly be revised to require the production of this type of information and records. Another option is to require the production of authorizations within sixty days of an appearance by the defendant as well as disclosures within that same time period.

The discussion then turned to medical malpractice cases and commercial and property disputes. Does an initial status conference make sense for those types of cases? The consensus was that such a conference would be a good idea. The conference would be used to set the trial date, the dispositive motion date and the discovery deadlines. Even though few cases are disposed of by summary judgment in the state courts as compared to the federal courts, having that date in place can avoid problems with the trial date later on. One issue that came up was the production of electronically stored information, which can be an issue in the commercial cases. Another discussion involved the utility of having the clients at that initial status conference and the need to have the attorney and/or a person with authority so that issues could be resolved at the conference. For smaller firms, it may not always be possible to have the specific attorney who "owns" the case to appear. The concept of having a standing order requiring the attorneys/self-represented parties to meet prior to the status conference to identify the issues in the case and the scope and extent of discovery was also discussed.

The group also discussed the concept of an omnibus motion addressed to the pleadings to streamline the process and eliminate filing of multiple motions addressed to the pleadings (request to revise, motion to strike). Individual calendaring with an initial meeting with a judge may result in the elimination of many of these types of filings. A comment was made

to the effect that the most valuable time spent in court is in the judge's chambers, not arguing a motion.

As a part of the overall discussion, the committee talked about scheduling orders. The concept of setting dates for the trial and the filing of dispositive motions at the initial scheduling conference, which cannot be changed by the parties, and also setting other dates for the completion of depositions and other discovery, which the parties could change by agreement, was discussed. If the parties cannot agree, then the original scheduling order deadlines would remain in place. Members of the committee believed this would help.

With reference to the dates in scheduling orders, the consensus of the group was that the attorneys should be able to change any dates in the order other than the trial date or the dispositive motion deadline date. In certain circumstances, a trial date could be moved, such as a plaintiff is still treating or through circumstances beyond the control of the parties, a deposition could not be completed or a witness is unavailable for the trial. The court has an interest in keeping its own schedule; however, it is critical that flexibility not be written out of the system.

Finally, a brief discussion took place on the handling of cases in which nothing is going on. Do we need a statewide dormancy program so that there is some uniformity in the handling of these cases? That question led to a general discussion on the lack of consistency that still occurs, including the picking of trial dates. If people are experiencing issues with trial date selection and one JD's failing to honor an existing trial date in another JD, they should contact Judge Lager.

IV. Background and Discussion of Expedited Litigation Track – The underlying purpose of an expedited litigation track is to address the costs of litigation while still ensuring that people have the opportunity to make their case. This docket is not about getting a faster trial date because typically, statewide trial dates are being scheduled within 16 – 18 months of a return date. This docket would be aimed more at providing a streamlined process that was simpler and less costly.

In connection with the cost of litigation issue, it was mentioned that the cost of document production, particularly with reference to production of electronically stored information, is huge, but is not typically a problem in small commercial cases. The cost issue led to a brief discussion of the concept of proportionality in discovery or the imposition of requirements that the party seeking all of this information should be the one to pay for it. Further discussion should take place on this issue.

V. The group was asked whether they felt there was any need or any interest in a docket with limited discovery, limited motion practice and a quick trial date. Judicial did have a program for cases that were under $50,000 in value, but it was recently eliminated because it was not being used.

Discussion took place on the need for this docket, which would be less about the speed of the trial, and more about reducing the cost of a day in court. For example, the program could involve the filing of a single motion addressed to the pleadings, limited discovery, an agreement to a box voir dire and a trial within six months. All parties would opt in or the case would not be part of the docket. The group expressed an interest in this kind of docket for the small personal injury cases and small commercial disputes. This type of docket might also provide trial opportunities for attorneys and allow people with smaller cases to get representation. Member thought a jurisdictional limit of $100,000 could address between 20 and 25% of the cases.

Other states who have attempted this type of docket have found that making it a voluntary program is not generally successful. Some states have concluded that the program should be mandatory and allow people would have to convince the judge that their case does not belong in the expedited program. An incentive for the defendant might be the jurisdictional limit – a cap on the amount of damages. Other suggestions were made to include other economic incentives to encourage parties to use the program: automatic offer of judgment interest; or providing for a penalty from declining to participate in the program that is analogous to the penalty for transferring a small claims case to Superior Court.

The question as to whether this program would be in place of the court arbitration program or simply an adjunct to it. The thinking of the group was that including too many steps would eliminate the incentive for participating in the program. The program would probably include only some type of early discovery/scheduling order conference at the beginning of the process and a combination pretrial/trial management conference closer to the trial date. The program should also include a later "opt-out" option for those cases that increase in complexity or have increased damages from the time of filing. Also, people would be able to appeal the case.

The members expressed concern over whether the plaintiffs' bar would be willing to opt in to the program and whether the defense bar would routinely opt out of it. The suggestion was made to pilot the program somewhere to see what the response to it is going to be.

The basic parameters of limit on amount in demand, an opt-in provision as well as an opt-out provision, limited discovery and an agreement to box voir dire will be expanded, and the group will meet again in January to talk about the draft proposals based upon today's discussion.

VI. Future Meeting Dates – Staff will circulate possible dates for a meeting in January.

Meeting adjourned at 4:20 pm.